

CLASS ACTIONS IN SINGLE EVENT OCCURRENCES

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CLASS ACTIONS IN SINGLE EVENT OCCURRENCES

by

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In the aftermath of the Civil Rights Act of 1964, Congress amended Rule 23 of the Federal Rules Of Civil Procedure to assist classes of persons seeking to make the provisions of that act a reality. The rule had originally been intended to promote uniform treatment of shareholders, policyholders, patentholders and members of labor unions or other unincorporated associations, and before its 1966 amendment was generally understood to require that a party take affirmative steps to be included in the class in order to have the benefits of whatever resolution ensued. It did not take long for those other than civil rights activists to discover Rule 23 and shortly it became the weapon of choice for "Nader's Raiders" in suits claiming automobile defects and the like. More recently, any event potentially giving rise to any cause for legal redress on the part of any more than a handful of persons is likely to result in a suit carrying a demand for

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class certification on behalf of all of those conceivably affected who do not affirmatively ask to be excluded.

At one time, there was a certain novelty to media reports of class actions where the class members received coupons for razor blades, air travel or dental adhesives and their lawyers split millions of dollars. Now, these reports are commonplace, with the courts allowing class actions even in tort claims as a matter of course. With the potential for huge contingency fees, this mushrooming litigation should come as no surprise. The use of class actions has become particularly popular among the plaintiff's bar in industrial areas where there is a great concentration of petrochemical and refining plants. A class action on behalf of all persons living within a four parish (county) surrounding an explosion at Shell Oil Company's Norco Refinery in 1988 filed in the Eastern District of Louisiana was settled in 1994 after certification for \$170 million. At this time, there are a number of other large class actions pending in either state or federal court in Louisiana arising out of explosions or chemical releases.² Most of them seek compensatory damages mainly based upon a claimed fear from either hearing the explosion, hearing about it or hearing about the chemical release. Some claim to have actually smelled the chemicals released. Standing alone, few of the claims would reach the jurisdictional threshold of our courts and even fewer would command the attention of the plaintiff's bar. All seek millions in punitive damages. Their ticket to "The Big Spin" is class certification under Rule 23 or the equivalent

² *The author and his firm are currently defending more than a dozen such class actions.*

state rule. Defeating certification, or even limiting its scope, can mean a savings of millions to the defendant.

This article addresses class certification demands in claims arising out of a single event such as an explosion, chemical release, water pollution from a spill, etc., which are likely to be covered at least partly by insurance. While the author discusses the defense of a demand for class certification, often a defendant will seek class certification to conclude all potential liability in a single settlement. Further, while the references are to the Federal Rule, the rules of most states are similar and have been after Rule 23 or its predecessor, forum Equity Rule 38.

RULE 23

When parties seek to maintain a class action, they bear the double burden of proving that (1) each of the four requirements of Rule 23(a) (numerosity, commonality, typicality and adequacy of representation) has been met and that (2) the case fits within one of the three categories of Rule 23(b). Failure to satisfy any one of these requirements should defeat a request for class certification.

"NUMEROSITY"

Rule 23(a)(1) provides that a class action may be maintained only if the class is "so numerous that joinder of all members is impracticable"-- the

"numerosity" requirement. Plaintiffs seeking class certification usually allege that there are hundreds or thousands of claimants similarly situated which, at first blush, would appear intuitively to satisfy any definition of numerosity. However, the numerosity requirement is not satisfied by the mere allegation of a large number of claimants or by defining the class in extremely broad terms so as to allow these alleged claimants to be included in the proposed class.

Parties seeking to become class representative plaintiffs must first adequately define the proposed class and then establish that the class is so numerous that joinder of all members is impracticable.³ The description of the class must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." The class must not be defined so broadly that it includes individuals who have little connection with the claim being litigated.

In matters involving explosions or releases of gaseous, often toxic, materials, plaintiffs often define a proposed class in form-like pleadings as follows:

Persons sustaining damages, or survivors of persons who sustained fatal injuries, as a result of (the incident), whose rights to claim damages may be affected by a judicial determination of the issues of liability for compensatory and punitive damages resulting from the incident, and who may be included in one or more of the subclasses defined in this class action.

Plaintiffs often also propose subclasses similar to the following:

³ *Cook v. Rockwell International Corporation*, 151 F.R.D. 378, 382 (D.Colo. 1993).

Subclass A: Persons who sustained personal injury while engaged in the course of their employment with XYZ Corporation, as a result of (the incident) which occurred on the premises of XYZ Corporation's facility at (location) on (date) . . .

Subclass B: Persons or entities present, residing or owning property within a designated area or radius of XYZ Corporation's facility at (location), who or which sustained damages, other than those damages which could be asserted in Subclass A, as a result of (the incident) which occurred on the premises of XYZ Corporation's facility at (location) on (date) . . .

These definitions are so broad as to be meaningless and should fail to satisfy the numerosity requirement. Plaintiffs' burden is to demonstrate that there actually is a large class, not simply that there are many persons who could possibly be members of the class. In other words, the plaintiffs must show that the class actually has a large number of members, although the exact number need not be established.⁴

A claim simply that there are numerous persons sustaining "damages" as the result of the incident without any attempt to define "damages" also should not serve to meet the burden. A very substantial percentage, perhaps a majority, of putative claimants in proposed class actions arising out of explosions and releases are persons with claims for damages which are generally not recoverable under underlying state or federal law: for example, claims for negligent infliction of emotional distress unaccompanied by physical injury; fear of contracting a disease

⁴ *In re Three Mile Island Litigation*, 95 F.R.D. 164, 165 (M.D.Pa. 1982).

in the future absent evidence that he was actually exposed to a harmful agent shown to cause such disease; etc.

"COMMONALITY"

The second prong of the test requires that there be issues of law or fact common to the class -- the "commonality" requirement. This requisite is modified by Rule 23(b)(3) mandating that common questions of law or fact predominate over questions affecting only individual members. As Rule 23(b)(3) subsumes the commonality requirement of Rule 23(a)(2), decisions usually do not focus on the requirement. However, in a recent trial court decision from Texas,⁵ the court denied class certification in an action by thousands of residents against 10 petrochemical companies that allegedly polluted their neighborhood, it was held that the effect of the Texas comparative negligence statute destroyed, per se, requisite commonality. That court agreed with the defendants that Texas law requires a jury to "contemporaneously consider": 1) whether the conduct of each class member and each defendant violated any applicable standards; 2) the nature and extent of each class member's damages; and 3) the extent to which the conduct of each class member and each defendant caused any injury.

⁵ *Simms v. Amerada Hess Corp.*, No. 93-5767-B (Texas Dist. Ct. 117th Dist. Feb. 24, 1995).

"TYPICALITY"

The Rule 23(a)(3) "typicality" requirement overlaps somewhat with the requirement of adequacy of representation. However, typicality specifically requires that the claims or defenses of the representatives and the class arise from the same events or rest on the same legal theories. When the claims arise out of the same alleged cause of action, "it is thought that the representative will advance the interest of the class members by advancing his or her own interests."⁶ The claims of the potential class representative plaintiffs do not arise out of the same events when they allege the same injuries for different reasons in one or more other suits.⁷

ADEQUACY OF REPRESENTATION

⁶ *Id.*

⁷ *Machella v. Cardenas*, 653 F.2d 923, 927 (5th Cir. 1981)(If the named plaintiff is not hurt "in the same way", his claim is not typical and he cannot serve as a representative).

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The requirements for showing adequate representation are that "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class."⁸ The propensity of some judges to overlook due process requirements in a rush to remove troublesome cases from the docket has led to a number of very generous awards and settlements, which, in turn, has spawned an entire "cottage industry" of "professional plaintiffs" and "class action specialists." It is not uncommon, particularly in explosion, chemical release and various other pollution-based actions, to see the same individuals seeking time and again to be class representatives, represented by the same lawyers seeking to be class counsel. If a defendant's investigation reveals that the proposed plaintiff class representatives are class representatives in a separate action seeking redress for identical or substantially the same injuries, the argument can and should be made that their duties to one class render their interests antagonistic to members of the other class. The courts have recognized that one of the factors considered in determining whether the proposed class representatives have interests antagonistic to other class members is "other litigation pending between the plaintiff and defendants."⁹

⁸ *Vanderbilt v. Geo-Energy Ltd.*, 725 F.2d 204, 207 (3d Cir. 1983).

⁹ *Id.* at 207.

The existence of multiple class actions, by the same class representatives (and usually in those circumstances represented by the same counsel), seeking the same damages from different entities as a result of different events occurring within a substantially similar time frame, creates a textbook case of conflict of interest for both the potential class representative plaintiffs and class counsel. Suppose plaintiffs' medical experts cannot state with certainty which of different events caused plaintiffs' physical injuries. How will class counsel proceed? Suppose plaintiffs in one suit settle with that defendant. How will the class representatives and class counsel proceed vis a vis the other suit or suits? The list of potential conflicts is virtually endless. Depending on the outcome of one suit, the class representative plaintiffs may lose interest in the other case, leaving the rest of the class members without adequate representation. In these circumstances, it should be clear that plaintiffs cannot satisfy the adequacy of representation requirement of Rule 23(a)(4) in more than one suit.

This conflict not only taints the potential class representatives, but also affects class counsel to an even larger degree as the Rules of Professional Conduct¹⁰ for attorneys mandate that a lawyer refrain from representing a client (or group of clients) if that representation will be directly adverse to another client (or group of clients) or will materially limit the lawyer's responsibilities to another client (or group of clients.) Further, it is not uncommon for some members of the plaintiff's bar to promote potential class actions through widespread publication

¹⁰ Rule 1.7.

of their services in the media and otherwise, and with publication of "informational" materials and "free seminars." At least one court has recognized that potential solicitation by class counsel is a factor which weighs against certification.¹¹

COMMON QUESTIONS MUST "PREDOMINATE"

¹¹ *Yandle v. PPG Industries Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974).

Rule 23(b)(2) provides that a class action is maintainable if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." It is this section that has opened the door to the use of the class action in mass tort suits, although the United States Court of Appeals for the Ninth Circuit has flatly held that "(c)lass certification under Fed.R.Civ.P. 23(b)(2) is not appropriate where the relief requested relates 'exclusively or predominately to money damages.'"¹²

The requirements of Rule 23(b)(3) are at odds with the individual causation and damage issues which arise in mass tort litigation. Indeed, Rule 23 was not formulated to accommodate mass tort litigation. The Notes of the Advisory Committee on Rules provide in part:

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

¹² *Nelson v. King County*, 895 F.2d 1248, 1255-56 (9th Cir. 1990) (citing *William v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir.), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982)); *Doniger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1314 (9th Cir. 1977).

THE CURRENT TREND

Although for many years courts were unwilling to certify mass tort cases when other procedural means existed for trying them, recently they have granted certification almost mechanically. This trend appears to be based on a growing adherence to the judicial philosophy that class treatment is necessary to enable numerous claimants to gain access to court and to expedite the fair and cost effective resolution of claims. In the rush to implement this philosophy, it appears that many courts have overlooked the "fairness" aspect in favor of cost effectiveness. The question should be posed, "cost effectiveness for whom, the courts or the parties?" Class actions tend to "average out" the relief granted, with truly injured parties receiving less than they otherwise should and claimants whose "injuries" may be classified as marginal at best receiving more than they should. Even this observation is subject to question, as truly injured parties tend to "opt out" of class actions for this very reason, leaving an extremely expensive morass of litigation whose main value is the potential for runaway punitive damages. This is certainly not cost effective for the defendants.

Despite the current trend, defendants must aggressively fight the courts' attempt to mechanically certify mass tort claims without heeding the Advisory Committee's warning and the reasons underlying the judiciary's historical reluctance to certify mass tort personal injury litigation.

The recent wave of class certification in mass tort cases has resulted in hundreds of frivolous class actions and thousands of claimants without legally compensable injuries who climb aboard the band wagon of class claimants with the hope of financial gain. Unfortunately the class action vehicle, originally designed to enhance the goals of judicial economy and reduction of litigation costs, has produced a cost which society can no longer tolerate, as evidenced by current tort reform legislation pending in the Congress seeking to put an end to a system that serves to further unfounded claims, waste the Court's limited resources and retard the effective resolution of valid claims. Judicial restraint, whether self-imposed or mandated by Congress, can ultimately revitalize the efficiency of the class action methodology of trying the claims for which it was intended.

ALTERNATIVES TO CLASS ACTIONS

A class action is generally not the best way of channeling and adjudicating mass tort claims arising as a result of a single event. Use of the class mechanism in those cases necessarily disintegrates into time-consuming individual trials on causation and damages. A far superior method of adjudication instead entails consolidated discovery, coordinated motion practice, and consolidated trials on common issues, all of which is available to a court under Rule 42, Fed.R.Civ.P. or, in matters governed by the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rules 11 and 14 thereof. This method is more efficient, economical, manageable and fair to all parties and will provide fundamental due process by

allowing the defense of a party's alleged negligence, and prosecution of a plaintiff's damage claim, in proceedings in which each claim or a common group of claims can be evaluated on the merits, thereby avoiding the prejudicial effect of a single trial of all claims before a single jury and, in consequence, removing the potential for establishing damages in favor of plaintiffs who would be found to have no damages if their claims had been tried separately.